ENVIRONMENTAL LAW • INSTITUTE®

State Wetland Protection

Status, Trends, & Model Approaches

A 50-state study by the
Environmental Law Institute

With support from the
U.S. Environmental Protection Agency

2008

Appendix: State Profiles

New Mexico

I. Overview

New Mexico has lost more than one-third of its original 720,000 wetland acreage since the 1780s. Today, wetlands cover approximately 482,000 acres in New Mexico—less than one percent of the state's total area. Recognizing the value of the state's remaining wetland resources, the New Mexico Environment Department (NMED) is currently developing a comprehensive program to protect wetlands.[1]

New Mexico regulates wetlands through surface water quality management and §401 certification under the Clean Water Act (CWA). NMED's Surface Water Quality Bureau (SWQB) is responsible for the protection and management of the waters of the state, including wetlands. SWQB's Watershed Protection Section (WPS) coordinates all CWA §401 certification and §404 permits with the U.S. Army Corps of Engineers ("Corps"), as well as §319(h) activities in watersheds with Total Maximum Daily Loads or with assessed data.

II. Regulatory Programs

Wetland definitions and delineation

New Mexico's statutory definition of "water" is "all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water."[2] The regulatory definition of "surface water" is:

> all interstate waters including interstate wetlands, and all intrastate waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs or natural ponds the use, degradation, or destruction of which would affect interstate or foreign commerce. Surface waters of the state also means all tributaries of such waters, including adjacent wetlands, and any manmade bodies of water which were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state. Surface waters of the state does not include private waters that do not combine with other surface or subsurface water or any water under tribal regulatory jurisdiction pursuant to § 518 of the Clean Water Act. [3]

Surface water quality rules define wetlands as "those areas which are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions in New Mexico."[4]

Wetland delineation criteria correspond to the U.S. Army Corps of Engineers' 1987 *Wetlands Delineation Manual*. In addition, in 2000, the New Mexico Natural Heritage Program, Biology Department, and the University of New Mexico published the *Handbook of Wetland Vegetation*

---

[1] N.M. ENV'T DEP'T, NEW MEXICO 2000: WETLANDS CONSERVATION PLAN (Wetlands Task Force 2002), *available at* http://www.nmenv.state.nm.us/swqb/wetlandsplan-2000.html.
[2] N.M. STAT. § 74-6-2 (1978).
[3] N.M. CODE R. §20.6.4.7(CCC).
[4] *Id.* §20.6.4.7(OOO).

Communities of New Mexico, Volume I: Classification and Community Descriptions, an inventory and assessment of the state's wetland vegetation communities.

Organization of state agencies

The basic authority for water quality management in New Mexico is provided through the State Water Quality Act.[5] This law establishes the Water Quality Control Commission (WQCC)[6] and specifies its duties and powers. The commission is the state water pollution control agency for New Mexico for all purposes of the CWA and the Safe Drinking Water Act.

NMED-SWQB oversees protection and management of the waters of the state, including wetlands. Funding for WPS comes from U.S. Environmental Protection Agency (EPA) grants on a project-by-project basis. Approximately 1.5 full-time equivalents within the WPS are devoted to wetland-related activities. Duties include developing the Wetlands Program, gathering baseline assessment data for wetlands, completing wetland restoration projects, coordinating efforts with watershed groups and other state and federal agencies.[7]

§401 certification

Section 401 certification is the primary mechanism for state-level regulation of New Mexico's wetlands. WPS coordinates all CWA-related activities with the Corps. Five members of the WPS are responsible for §401 certification, and make an average of 130 certifications per year. Conditions that ensure that water quality standards are met are included in virtually all certifications. While reviewing an application for certification, WPS officials use best professional judgment to: identify potential water quality impacts from a project that is being permitted under §404; provide conditions for certification that protect water quality; and ensure that the permit will not violate state water quality standards, the Water Quality Act or the state's Water Quality Management Plan.[8]

Nationwide permits

The Albuquerque District Engineer proposed to use discretionary authority to modify certain 2002 nationwide permits (NWPs) by adding statewide regional conditions. These regional conditions were developed in consultation with SWQB and the New Mexico Department of Game and Fish.[9] In addition, the South Pacific Division Engineer approved six regional conditions applicable to specific NWPs within the State of New Mexico[10] and fifteen regional conditions applicable to all NWPs within the state.[11] New Mexico's action on the 2007 NWPs could not be reviewed within the reporting period.

---

[5] N.M. STAT. ANN § 74-6-1 *et seq*.
[6] *See:* New Mexico Environment Department, *Water Quality Control Commission*, *at* http://www.nmenv.state.nm.us/wqcc/members.htm (last visited July 26, 2007).
[7] Personal communication with Maryanne McGraw, N.M. Env't Dep't (July 31, 2006).
[8] Personal communication with Neal Schaeffer, N.M. Env't Dep't (July 19, 2006).
[9] Personal communication with Gene Manger, US Army Corps of Eng'rs, Albuquerque District (Aug. 16, 2006).
[10] United States Army Corps of Engineers, *Issuance of Statewide Regional Conditions to the Nationwide Permit Program in the State of New Mexico*, *at* http://www.spa.usace.army.mil/reg/NATIONWIDES-NEW/RegCon-NM.pdf (last visited July 26, 2007). Nationwide permit (NWP) #12 - Utility Line Discharges; NWP#13 - Bank Stabilization; NWP#14 - Linear Transportation Crossings; NWP#27 - Stream and Wetland Restoration Activities; NWP#39 - Residential, Commercial, and Institutional Developments; and NWP#44 - Mining Activities.
[11] *Id.* These conditions relate to permits that concern: Activities Involving Fills in Perennial Waters or Wetlands Larger Than 1/2 Acre; Springs; Temporary Water Diversion; Non-Water Dependent Activities; Pre-Construction

Mitigation
The State of New Mexico has no guidelines, policies or legislation (beyond federal requirements) that outline mitigation requirements for permitted impacts to wetlands or streams. As of 2007, there are no mitigation banks in New Mexico; therefore the state does not participate on a Mitigation Banking Review Team.

Compliance and enforcement
New Mexico generally defers to the Corps for violations under §404 of the Clean Water Act.

Tracking systems
The State of New Mexico has not developed a system for tracking permits or mitigation.

III. Water Quality Standards

New Mexico has not adopted wetland-specific water quality standards. However, the state's surface water quality standards (WQS) do apply to all state waters, which include wetlands. The New Mexico Administrative Code outlines numeric and narrative surface water quality standards, including both site-specific and use-specific criteria, which are established by the WQCC to protect designated, existing, and attainable uses. State code does not identify separate designated uses or anti-degradation standards for wetlands, defaulting to designated uses and anti-degradation provisions for surface waters.[12]

In 2005, New Mexico assigned secondary aquatic life and contact recreation uses to unclassified ephemeral, intermittent, and perennial waters; however, EPA was unable to approve some specific provisions without supporting use attainability analyses (UAAs) for uses less than those specified in CWA §101(a)(2). As of 2007, New Mexico is developing procedures for categorical and site-specific UAAs. Once the UAAs are approved, EPA may approve these provisions as effective under the CWA.[13]

IV. Monitoring and Assessment

New Mexico has not yet developed an assessment methodology or a monitoring program specifically for wetlands. However, EPA has provided funding to the Wetlands Program for the development and institution of a hydrogeomorphic (HGM) approach for assessing wetland and stream functions in the state. This assessment methodology, to be developed by the Wetlands Program and the Corps, will be used to assure adherence to §401/404, to determine water quality

---

Notifications; Soil Erosion and Sediment Controls; Pollution Controls; Equipment Inspection; Fuel and Petrochemicals; Vegetation Removal and Mitigation; Aquatic Life Movements; New Mexico State Threatened and Endangered Species; Important Spawning Areas; Gradient; Designated Critical Resource Waters in New Mexico.

[12] N.M. CODE R. 20.6.4.12.

[13] Personal communication with U.S. Envtl. Prot. Agency Region VI (Aug. 16, 2006).

standard designated uses, and to facilitate enforcement and mitigation. The state plans to model their HGM methodology after that developed for Colorado.[14]

In 2007, WPS applied for a grant to develop a ten-year monitoring strategy, but at the time of writing, the agency had not yet been given notice as to whether the funding would be granted. While New Mexico does not yet actively support a volunteer wetland-monitoring program, the Wetlands Program plans to allocate part of one of its federal grants to start a program on the lower Rio Grande.[15]

V. Restoration and Partnerships

Since 2003, New Mexico has operated a wetland restoration program that is part of a larger initiative to improve the state's watersheds and water quality. Funding for the program has come from nine separate EPA grants. The larger initiative employs a cost-share approach to further the state's mitigation, restoration, and conservation efforts. SWQB provides funding for watershed groups to reduce TMDL pollutants in their watersheds and uses TMDL pollutant levels to prioritize sites for funding. New Mexico tribes serve as program partners whenever the opportunity arises.[16]

SWQB also provides funding to watershed groups to develop wetland action plans that delineate goals for protection, restoration, mapping, monitoring and education. SWQB hopes to add two new watershed groups to the program every year and to create 30 new acres of wetlands within the watershed of each group that has created a wetland action plan. SWQB has also developed GIS databases mapping the wetlands within the watersheds of participating groups and identified potential sites for restoration projects.[17]

WPS and the Wetlands Program also provide competitive funding to private landowners. WPS has a website that provides information on how the public may take part in these programs.[18]

VI. Education and Outreach

New Mexico does not operate an education and outreach program specific to wetlands. However, a portion of EPA's restoration grants is used to fund outreach activities tailored to particular watersheds. Two examples of past outreach activities include: an intensive one-week course for the New Mexico Department of Transportation on wetland restoration techniques and protection measures for transportation projects and a three-week training program for invited restoration experts from state and federal agencies and watershed groups.[19]

---

[14] McGraw, *supra* note 7.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] New Mexico Environment Department, Surface Water Quality Bureau, *at* http://www.nmenv.state.nm.us/swqb/ (last visited July 26, 2007).
[19] McGraw, *supra* note 7.

VII. Coordination with State and Federal Agencies

In 2000, NMED released a comprehensive Wetlands Conservation Plan. State staff view the plan as a useful resource and will implement some elements, but also plan to develop a new, more specific plan in the future.[20]

SWQB participated for the first time in a meeting with state and federal agencies on wetland issues, including regulatory issues, in August 2006. This endeavor has grown into quarterly meetings of the New Mexico Statewide Wetlands Roundtable. The Wetlands Program serves as the lead, and a variety of state and federal agencies participate. Section 401/404 and other wetland-related regulatory issues are discussed at each meeting.[21]

VIII. Acronyms and Abbreviations

CWA – Clean Water Act
EPA – U.S. Environmental Protection Agency
HGM – Hydrogeomorphic
NMED – New Mexico Environment Department
NWP – Nationwide Permits
SWQB – Surface Water Quality Bureau
TMDL – Total Maximum Daily Load
UAA – Use Attainability Analyses
WPS – Watershed Protection Section
WQCC – Water Quality Control Commission

[20] *Id.*
[21] *Id.*